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U.S. Citizenship  
and Immigration  
Services

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**FEB 24 2004**

FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

IN RE:

Petitioner:

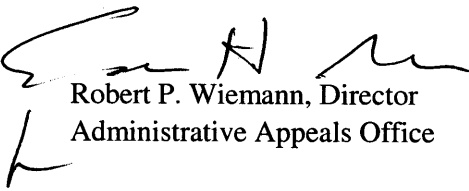
Beneficiary:

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)  
of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dental laboratory. It seeks to employ the beneficiary permanently in the United States as a dental ceramist. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is March 11, 1998. The beneficiary's salary as stated on the labor certification is \$18.00 per hour or \$37,440.00 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage and of the beneficiary's experience. In a request for evidence (RFE) dated May 29, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence and additional evidence of the beneficiary's experience.

Counsel responded to the RFE with a letter dated July 16, 2002 accompanied by additional evidence.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence, and issued a Notice of Intent to Deny (NOID) dated August 20, 2002. Counsel responded to the NOID with additional evidence.

After evaluating the evidence submitted in response to the NOID, the director determined that the evidence still did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition in a decision dated December 9, 2002.

Counsel submitted a notice of appeal which was received on January 9, 2003. The notice of appeal states that counsel represents [REDACTED] who is the beneficiary in the instant case. The beneficiary is not a party authorized to appeal the decision in the instant case. Nonetheless, the file also contains a Form G-28 Entry of Appearance previously submitted by the same counsel on behalf of the petitioner, which is signed both by counsel and by the petitioner's owner. Therefore, the Notice of Appeal will be deemed to have been submitted on behalf of the petitioner.

On appeal, counsel submits a brief and no additional evidence.

The evidence indicates that the petitioner is a sole proprietorship. In his decision the director correctly noted the adjusted gross income figures from the tax returns of the petitioner's owner for 1998 through 2001. The figures for those years were \$45,534.00 for 1998, \$57,012.00 for 1999, \$77,762.00 for 2000 and \$76,455.00 for 2001.

The director found that the adjusted gross income of the petitioner's owner for 1998 and 1999 was higher than the proffered wage but found that the amount of income remaining to the owner after paying the proffered wage in each of those years would have been insufficient to pay the living expenses of the owner's four-person household.

The director's decision did not state the amounts remaining for the owner's household expenses, but for 1998 the adjusted gross income of \$45,534.00 minus the proffered wage of \$37,440.00 yields a remainder of \$8,094.00, and for 1999 the adjusted gross income of \$57,012.00 minus the proffered wage of \$37,440.00 yields a remainder of \$19,572.00.

Counsel argues in his brief that the adjusted gross income figures show an increase each year, including a 30% increase from 1998 to 1999. Nonetheless, this argument does not address the inability of the petitioner to pay the proffered wage in the years 1998 and 1999. The evidence does not include any information which would indicate that hiring the beneficiary would have allowed the petitioner to significantly increase its income. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Counsel argues that poverty guidelines for 2002 show a minimum income for a household of four persons to be \$22,625.00. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Even if it were assumed that the information on poverty guidelines in counsel's brief is accurate, the evidence would still fail to establish the ability of the petitioner to pay the prevailing wage during 1998 and 1999, since the amounts remaining for the owner's household expenses after paying the proffered wage would have been less than the figure cited by counsel as the poverty guideline for a household of four persons.

Counsel states that the owner's wife is a nurse who, as of the time of the brief, planned to start working "at the hospital" in October 2003. No further details on this fact are contained in counsel's brief or in the evidence. Therefore the significance of the asserted employment plans of the owner's wife cannot be determined from the evidence in the record or from counsel's brief.

For the foregoing reasons, the petitioner has not established that it has had the continuing ability to pay the beneficiary the proffered wage.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.